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## THE PURPOSE OF DEATH: A REPLY TO PROFESSOR DWORKIN

ALEXANDER MORGAN CAPRON†

“But men may construe things after their [own] fashion,  
Clean from the purpose of the things themselves.”

William Shakespeare\*

The recent transplantation at the Stanford Medical Center of the heart and kidneys of a victim of an armed assault has served to emphasize again the need for a new definition of death which would permit an authoritative determination whether a person whose brain functions are permanently destroyed is dead or alive. Dr. Leon Kass and I have proposed a model statute<sup>1</sup> which attempts to set to rest the uncertainties for the criminal and civil law both in unusual situations such as that of the California homicide organ donor, and in the far more common, but no less troubling, situation in which the “vital signs” of a comatose patient are supported for some time and the question arises, “Is he dead?”

Professor Roger Dworkin argues that all such efforts to define death are misguided in failing to ask the purpose for which the definition is sought.<sup>2</sup> I might have replied simply that the primary concerns behind our attempt to provide a new definition of death, centering on the dilemma brought on by modern medical techniques, were obvious enough as

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\* JULIUS CAESAR I, iii, 34.

1. A person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous respiratory and circulatory functions. In the event that artificial means of support preclude a determination that these functions have ceased, a person will be considered dead if in the announced opinion of a physician, based on ordinary standards of medical practice, he has experienced an irreversible cessation of spontaneous brain functions. Death will have occurred at the time when the relevant functions ceased.

Capron & Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87, 111 (1972) [hereinafter cited as Capron & Kass].

2. Dworkin, *Death in Context*, 48 IND. L.J. 623, 628 (1973) [hereinafter cited as Dworkin]. I was puzzled, and made a little uncomfortable, by the way that Professor Dworkin lumps the article by Dr. Kass and myself into what he calls the definition of death literature. Quoting from others, he ascribes to this group certain views which I not only do not share but was at some pains to disavow in the original article. Foremost among these is the premise that the law must “define death in a manner acceptable to physicians.” *Id.* at 624. It is also erroneous, as Professor Dworkin recognizes at another point, to pretend to be speaking of our article when observing that “they agree that organ transplantation is a ‘good.’” *Id.* at 625. Our proposal was based on no such premise.

not to require expatiation. I believe, however, that Professor Dworkin's presentation provides a useful opportunity to suggest the error in adhering rigidly to the usual, lawyerly, purpose-oriented analysis. Moreover, there is a danger that many who read Professor Dworkin's article will not have read the original and may thus be misled by the largely semantic distinctions he draws. For these reasons, then, I offer this brief analysis of two central "fallacies" in Professor Dworkin's argument and a restatement of what seem to me the real points at issue—on which I cannot help but think Professor Dworkin and I are in basic agreement, whatever he may say to the contrary.

#### THE FALLACY OF OVEREXTENSION

Professor Dworkin sums up his criticism of the "death definition literature" by stating that it has failed to address the basic question: "What difference does it make whether somebody is dead?"<sup>3</sup> He then suggests that one answer to this question is that it makes no difference at all. Unfortunately, his analysis is based on what may be called the fallacy of overextension.

This fallacy is illustrated by Professor Dworkin's discussion of the punishment of life-threatening behavior. Most people agree, he writes, that someone who intentionally tries to kill another ought to be punished very severely for any of a number of reasons. From this premise, he argues that since none of these reasons is affected by whether the victim dies, "his fortuitous survival ought in no way affect the degree of punishment inflicted on his attacker."<sup>4</sup> This is an interesting argument about criminal jurisprudence, but it is irrelevant to the task of defining death. Professor Dworkin may be right in his disagreement with the drafters of the *Model Penal Code*,<sup>5</sup> but the question he is debating is whether the deterrent and punitive purposes of the criminal law are well or ill-served by distinguishing between murder and attempted murder. The fallacy lies in trying to extend whatever purposes the criminal law may have in selecting certain conduct for severe sanctions into a discussion of the definition of death. Professor Dworkin cannot possibly mean to suggest that the purposes of the criminal law require that all victims of homicidal attacks be declared "dead" so that their assailants may be prosecuted for murder. Rather, were a legislature convinced by Professor Dworkin's views on substantive criminal law, it should punish alike all intentional efforts to take human life whether they cause death or not.

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3. *Id.* at 629.

4. *Id.* at 631.

5. *Id.*

## THE FALLACY OF THE PRESUMPTUOUS PRESUMPTION

Professor Dworkin's second argument involves his view that the law sometimes refers to such factors as the length of time that a person has been absent from home without tidings to define death.<sup>6</sup> Since such a standard for determining death is not included in the definition that Dr. Kass and I proposed, Professor Dworkin concludes that we ignored "the fact that the law has long recognized that death occurs at different times for different purposes."<sup>7</sup> Of course, we did no such thing. Professor Dworkin is guilty of employing the fallacy of the presumptuous presumption.

A society, in order to take account of the alienation of affections and to permit the alienation of property, must establish certain rules for determining such matters as when a person is legally married and when property passes to heirs. For reasons which seem too obvious to elaborate, our society has traditionally chosen to regard death as one of the major nonvolitional determiners of a person's status and also of the status and rights of his family and property. Because of a recognition that other events besides a person's death may be appropriate occasions for the liberation of spouse and estate, the law provides that in certain circumstances, such as undue absence, spouses may remarry, property may be distributed, and the like.<sup>8</sup> The law seeks to protect both the interests of the absentee and those of his or her relatives and friends.

Even so, some states go to elaborate lengths to safeguard the rights of the absentee by providing for delay before property is actually distributed, and for an additional period during which persons to whom property is distributed must post bonds to assure its return should the absentee reappear.<sup>9</sup> In most jurisdictions, judicial orders may even be overturned if the "dead" person reappears at any time.<sup>10</sup>

Plainly, then, what is involved in such "definitions" is only a *pre-*

6. *Id.* at 633-36.

7. *Id.* at 633.

8. The law in Pennsylvania is illustrative. A trustee may be appointed for a person who is "absent from his last known place of residence for a period of one year without being heard of after diligent inquiry" upon petition of a person interested in the absentee's property, to conserve that property and enter into certain sales with court approval and under bond. PA. STAT. ANN. tit. 20, § 5702 (1972). During the trusteeship, the court may after proper notice, *id.* § 5704, make a finding that the absent person is dead, based on particular facts or on the presumption which arises from seven years "unexplained absence." *Id.* § 5701. See also CAL. PROB. CODE §§ 260-272 (West 1972).

9. See, e.g., CAL. PROB. CODE §§ 285-94 (West 1956).

10. See, e.g., OHIO REV. CODE ANN. § 2121.09 (Page 1968) ("on satisfactory proof that a presumed decedent is in fact alive"); PA. STAT. ANN. tit. 20, § 5703 (1972) ("if it shall later be established that the absentee was in fact alive at the time of distribution"). See also *Scott v. McNeal*, 154 U.S. 34, 47-50 (1894).

*sumption*. It might be objected that a physician's declaration that a body is dead is also only a presumption based on his opportunity to inspect the body, his skill in doing so, and on certain probabilities which enter into the conclusions he draws from his observations. However, the type of "presumptions" involved in definitions of death, such as the Capron-Kass proposal, relate to physical observations about apparent corpses, and are not presumptions resorted to only because the circumstances preclude such observations.

The presumptions which Professor Dworkin cites have only limited effect. For example, one may not with impunity murder a person whose absence from home for seven years has led to the presumption that he is "dead" for such purposes as distributing property.<sup>11</sup> In brief, they are presumptions about property rights or family status and not definitions of death at all.<sup>12</sup>

#### THE PURPOSE OF DEFINING DEATH

Professor Dworkin objects to the thrust of such an argument, however, because he believes it overlooks the question of purpose. It seems to me that he would have us treat death as something freely to be defined after our own fashion, as the Bard writes, "clean from the purpose of the thing [itself]."<sup>13</sup>

We define death in an attempt to arrive at an agreed upon standard for describing a phenomenon which we think we observe in the life cycle of all beings. Of course, the definition can no more be "clean" of the cultural context in which it will operate than it is of the thing itself. However, the uses to which the status of being dead may be put need not fashion the definition of death.

Professor Dworkin has asked the wrong question. Rather than asking the purpose for which we are defining death, we must ask what use the law should make of a "definition of death" which has been framed not as a legal fiction, but as a reflection of social and biological reality. There are several legal consequences which traditionally have flowed from the status of "death" and there is every reason to believe that most or all of these will continue to apply.<sup>14</sup> Society may, however,

11. Cf. *United States v. Gainey*, 380 U.S. 63, 80 (1965) (Black, J., dissenting).

12. *Cunnius v. Reading School Dist.*, 198 U.S. 458, 469-71 (1905); *In re Crater's Estate*, 171 Misc. 732, 733, 13 N.Y.S.2d 597, 598 (Sur. Ct. 1939) (presumption "is an arbitrary one rendered necessary upon grounds of public policy in order that rights depending upon the life of one long absent and unheard of may be settled").

13. W. SHAKESPEARE, *JULIUS CAESAR* I, iii, 34.

14. Examples are provided in Dworkin, *supra* note 2, at 629. It may seem odd to Professor Dworkin that "all these different situations [are] susceptible to resolution by one definition of death," but while it is recognized that statutory and common law rules on this as other matters are subject to change it is perhaps note-

decide that another status besides "death" should be used in certain circumstances to trigger the consequences which normally follow upon a determination of death.<sup>15</sup> For example, Professor Dworkin's argument about the law of attempted murder suggests that the victim's status as an object of a life-threatening act should be substituted for death as one of the elements of a "homicide" conviction.<sup>16</sup> Dr. Kass and I made a similar suggestion concerning organ transplantation.<sup>17</sup> Since it is important for transplantation purposes to obtain organs before they have deteriorated, we recognized that the demand for viable organs may exceed the supply made available under our standards for determining whether death has occurred. If society wishes to encourage organ transplantation, we argued that it should do so directly by adopting standards for determining when a donor's organs may be removed although he is not dead.<sup>18</sup> Standards might vary depending upon such factors as the urgency of the recipient's need and on whether the donation was at the donor's prompting or that of his relatives after he became comatose. Substantive and procedural safeguards against overreaching, bias or conflicts of interest on the part of physicians would probably also be advisable as part of a law establishing the status of "organ donor." The unnecessary of such safeguards in the ordinary circumstances where death is pronounced is an indication of why it is preferable to describe "organ donor" status as a separate category from which certain consequences flow.<sup>19</sup> The issue should not be confused by saying that it is

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worthy that our society has found it acceptable to employ a single concept of the end of human life in all these contexts.

15. Let us suppose, for example, that at the moment the law permits life-supporting treatment of comatose patients to be ended only when they have died. The status of suffering from permanent loss of higher brain faculties might be substituted for the status of being "dead" in those circumstances. As Professor Dworkin suggests this could amount to an attempt to solve the difficult issue of euthanasia by the definitional route. Dworkin, *supra* note 2, at 637. It is exactly for this reason, however, that Dr. Kass and I argue that one must keep separate the questions "when is a person dead?" and "when should he be allowed to die?" Capron & Kass, *supra* note 1, at 105. I thus agree with Professor Dworkin that a state may wish to provide for devolution of an estate when a person's "chance of a return to health, productivity or even consciousness was . . . slight," without removing the penalties for homicide if his heart were removed by a physician or other murderer. Dworkin, *supra* note 2, at 632. Nevertheless, the clearest way to achieve the state's ends would not be to call the person dead when his prognosis is very bad but to establish a procedure for distribution of property prior to death, thereby preserving all the other expectations about his treatment as a nondead person.

16. Dworkin, *supra* note 2, at 631.

17. Capron & Kass, *supra* note 1, at 107-08.

18. If the legislature wanted instead to discourage or even prohibit organ transplantation, the simplest and surest thing to do would be to place limits on the surgical procedures themselves. To do it as Professor Dworkin proposes, *see* Dworkin, *supra* note 2, at 638, by monkeying around with the "definition of death," would not only be inefficient but would spawn confusion and probably be unenforceable as well.

19. *Cf.* Blinn v. Nelson, 222 U.S. 1, 6-7 (1911) (statute assures adequate notice

another definition of death.

Similar considerations led us to separate the questions of when a person is dead and when a person should be allowed to die.<sup>20</sup> The growing ability of medical science to prolong the process of dying by means of "heroic" and expensive treatment (some of which is also painful and dehumanizing) creates concern that standards must be established to determine when treatment for a dying patient may be ended. Societal permission for the practice of euthanasia<sup>21</sup> and, of course, the actual decision to undertake it in an individual case would require careful but painful deliberation. While the need for such deliberation cannot be overcome by the formulation of a definition alone, it can make the decision to cease treatment less agonizing in those cases in which it is found that the patient is dead. Furthermore, a failure to draw any line between the dead and the dying is an invitation either to incredible abuse or to paralysis.<sup>22</sup>

Since he provides no indications that his approach to legislative drafting is ever actually employed, Professor Dworkin's alternative to the Capron-Kass statute is at least novel. Rather than first establishing a single definition of death, and then employing the term "death" in other statutes concerning marriage, property, contracts, homicide, etc., Professor Dworkin proposed that all such statutes include separate clauses (such as "when said person's heartbeat and respiration cease") to define death.<sup>23</sup> It is hard to see what would be gained by this unique approach to legislation.<sup>24</sup> More practically still, Professor Dworkin fails to adduce any evidence that "special purpose" definitions (as opposed to presumptions) have been urged in any area besides organ transplantation.

It is good that Professor Dworkin has presented the traditional

and other safeguards); *Cunnius v. Reading School Dist.*, 198 U.S. 458, 476-77 (1905) (statute provides essential safeguards for protection of the property of the absentee which is to be administered).

20. Capron & Kass, *supra* note 1, at 105.

21. For purposes of this discussion, no distinction need be drawn between withdrawing necessary treatment from dying patients (negative euthanasia) and administering a substance which brings life to a quick and painless end (positive euthanasia).

22. If death is "totally beyond our ken," Dworkin, *supra* note 2, at 638, how can we decide whom to treat or whom to bury, etc.?

23. *Id.*

24. If Professor Dworkin were right about legislative drafting, then the statutes on the presumptive death of absentees, *see id.* at 633-36, would speak only in terms of criteria (length of absence, no tidings, circumstances of disappearance, etc.) and would not use terms like "as if dead." They do, however, all use such terms. Although these statutes do not, as was emphasized above, "define death" but only establish rules for distribution of estates, etc., their draftsmen clearly found it useful (as common law judges had) to refer to death analogically, to help orient decisionmakers to the statute's commands.

lawyer's approach of analyzing purpose. I believe, however, that the task of defining death simply cannot be tied to such a procrustean bed. The purposes for which a definition will be used, beginning with medical decisionmaking and continuing through the whole list of consequences which the law has traditionally had follow upon death,<sup>25</sup> are not the difficult points at issue. The real challenge, which Dr. Kass and I tried to meet, is for the present-day legal definition to take into account the realities, and the dilemmas, of modern medicine. We proposed that neurological standards have a place in a modern restatement of the traditional understanding of death.<sup>26</sup> I continue to believe that there should be a "robust and well-informed public debate"<sup>27</sup> over whether neurological factors should play a greater or lesser role in a statutory definition. I also remain of the opinion that it is well for a statute to leave

for future resolution the even more difficult problems concerning the conditions and procedures under which a decision may be reached to cease treating a terminal patient who does not meet the standards set forth in the statutory "definition of death."<sup>28</sup>

If the public and its representatives were to tackle these difficult tasks, I seriously doubt that the questions at issue between Professor Dworkin and myself would or ought to be of more than academic concern.

25. See note 14 *supra* & text accompanying.

26. It has long been known that, even when a patient loses consciousness and becomes areflexive, he may recover if heartbeat and breathing continue, but if they do not there is no hope of recovery. Thus, death came to be equated with the absence of these two "vital signs," although what was being detected was really the permanent cessation of the integrated functioning of the circulatory, respiratory, and nervous systems. In recent years, the traditional concept of death has been departed from, or at least severely strained, in the case of persons who were dead according to the rationale underlying the traditional standards in that they had experienced a period of anoxia long enough to destroy their brain functions, but in whom respiration and circulation were artificially re-created. By recognizing that such artificial means of support may preclude reliance on the traditional standards of circulation and respiration, the statute proposed here merely permits the logic behind the long-existing understanding (*i.e.*, integrated trisystemic functioning) to be served; it does not create any "new" type of death. Practically, of course, it accomplishes this end by articulating the "new" standard of "irreversible cessation of spontaneous brain functions," as another means of measuring the existing understanding.

Capron & Kass, *supra* note 1, at 112, n.89.

27. *Id.* at 118.

28. *Id.*

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